

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:WR:PNW:SEA:TL-N-6168-99

TNTomashek

Date: OCT 25 1999

To: District Director, Seattle
Attn: Barbara Knight, Group Manager MS W135

From: District Counsel, Seattle MS 670

Subject: Request for Advisory Opinion

Taxpayer: [REDACTED]

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This refers to your request of October 13, 1999, for our advice in the above-entitled case.

ISSUE

The issue is whether I.R.C. §§ 1311 through 1314 apply in this case to mitigate the effect of the statute of limitations on a refund for the taxable year [REDACTED].

FACTUAL BACKGROUND

As we understand this case, based on a discussion with the revenue agent and a reading of the submission of the taxpayer's counsel, [REDACTED] is a holding company for a number of corporations in the [REDACTED] family of corporations. During a

review of the case prior to presenting it to the Joint Committee to consider a refund for [REDACTED], a question was raised regarding the taxpayer's entitlement to carry a [REDACTED] net operating loss (NOL) into [REDACTED].

According to the taxpayer, [REDACTED] reported a substantial loss when it filed its return for [REDACTED]. At that time the taxpayer inadvertently failed to file an election under I.R.C. § 172(b)(3) to relinquish the carryback period and instead to carry the loss forward. When the [REDACTED] return was filed, it showed the entire amount of the [REDACTED] NOL as a carry forward deduction on such return.

The Service examined the returns for [REDACTED] and [REDACTED] and reduced the [REDACTED] NOL. However, the Service did not adjust the [REDACTED] income by carrying the [REDACTED] NOL back to [REDACTED]. (No carryback to [REDACTED] and [REDACTED] was available because both of those returns showed losses.)

In [REDACTED] the taxpayer filed Form 1120X for [REDACTED] to reflect the results of the audit adjustments for [REDACTED] and [REDACTED] including the Service's reduction of the [REDACTED] NOL and various other adjustments to the [REDACTED] return.

On [REDACTED], the statute of limitations expired for the carryback of the [REDACTED] NOL to [REDACTED]. On [REDACTED], the Service sent the taxpayer the initial version of the Joint Committee spreadsheet indicating that the [REDACTED] NOL must be carried back to [REDACTED] before it could be carried forward to [REDACTED]. On [REDACTED], the Service sent the taxpayer a revised Joint Committee spreadsheet indicating that the [REDACTED] NOL that was disallowed as a carryover to

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████ generated a barred overpayment when it was carried back to █████. The taxpayer contends that it is entitled to the relief granted by the mitigation provisions of I.R.C. §§ 1311 through 1314 with respect to the █████ overpayment.

LEGAL DISCUSSION

Our initial inquiry centered on the applicability of Treas. Reg. §§ 301.9100-1 through 301.9100-3 [relating to extensions of time to make elections] to the election that the taxpayer should have made with its █████ return to carry the NOL forward to █████ instead of back to █████. We were informed by the Chief Counsel's office that relief under the aforementioned regulations would be granted only if the election under § 172(b)(3) were made within six months of the due date. Therefore, such relief is not available in this case.

We then considered the mitigation provisions as they may apply to this case. The first requirement is that there must be a circumstance described in § 1312 in order for mitigation to come into play. In this case, the circumstance would be a double disallowance of a deduction (the █████ NOL deduction being disallowed in both █████ and █████). This circumstance is described in § 1312(4).

However, the circumstance requires a "determination" as defined in § 1313(a). It does not appear that there has been a determination yet, but there will be a determination under § 1313(a)(3)(B) at such time that there is a final disposition by the Service of the taxpayer's claim for refund for █████. (We assume that the Service will partially disallow the █████ claim based on the requirement that

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the [REDACTED] NOL be carried back to [REDACTED] first.)

Once there is a determination for [REDACTED], the provisions of § 1312(b)(2)(B) come into play. It provides as follows:

"In the case of a determination described in section 1312(4) (relating to disallowance of certain deductions and credits), adjustment shall be made under this part only if credit or refund of the overpayment attributable to the deduction or credit described in such section which should have been allowed to the taxpayer or related taxpayer was not barred, by any law or rule of law, at the time the taxpayer first maintained before the Secretary or before the Tax Court, in writing, that he was entitled to such deduction or credit for the taxable year to which the determination relates."

Applying this provision to the instant case, it must be determined that the [REDACTED] overpayment resulting from the [REDACTED] NOL deduction was not barred at the time that the taxpayer first maintained before the Service in writing that it was entitled to the [REDACTED] NOL deduction in [REDACTED]. As we understand the instant case, the taxpayer maintained in writing in [REDACTED] on its Form 1120X for [REDACTED] that it was entitled to deduct the [REDACTED] NOL on its [REDACTED] return. The statute of limitations did not bar the [REDACTED] overpayment until [REDACTED], well after the filing of the [REDACTED] Form 1120X.

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CONCLUSION

Thus, the required conditions appear to exist for application of the mitigation provisions. Under § 1311(a), "the error [in this case, the double disallowance of the NOL deduction] shall be corrected by an adjustment made in the amount and in the manner specified in section 1314."

If you need any further assistance in this case, please do not hesitate to call on us. We are closing our file subject to reopening if the need arises. If you have any questions regarding this matter, please contact the undersigned at (206) 220-5951.

(SIGNED) THOMAS N. TOMASHEK

THOMAS N. TOMASHEK
Special Litigation Assistant

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